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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 604

ALBERT ADDESSI ET AL,
PETITIONERS,

v.

SHELL OIL COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ADOLPH N. ANDERSON, JR.
170 Westminster Street
Providence, Rhode Island 02903
Counsel for the Petitioners

CHARLES H. DRUMMEY
85 Westminster Street
Providence, Rhode Island 02903
Of Counsel

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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No.

ALBERT ADDESSI ET AL,
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SHELL OIL COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ALBERT ADDESSI and ADELINA ADDESSI, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on June 27, 1966.

Opinions Below

The opinion of the court below (Appendix A, infra, pp. 19-23) is unreported as yet. The opinions of the district court on both respondent's motion for summary judgment (Appendix D, infra, pp. 28-31) and on petitioners' motion

for summary judgment (Appendix C, infra, pp. 25-27) are unreported.

Jurisdiction

The judgment of the court below (Appendix B, infra, p. 24) was entered on June 27, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

On reversal of a summary judgment may the appellate court order summary judgment for the appellant, particularly when an unresolved genuine issue of material fact exists?

Rule of Court Involved

RULE 56

Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, eff. March 19, 1948.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be

supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, eff. July 1, 1963.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Statement

This is a diversity action brought in the District Court for the District of Rhode Island by Shell Oil Company, a Delaware corporation, hereinafter "Shell," against Albert Addessi and Adelina Addessi, husband and wife, of Cranston, Rhode Island, hereinafter "Addessis." Shell sought specific performance of a contract for the sale of

real estate, that Shell claimed came into existence on January 19, 1965, by virtue of Shell's exercise of a purchase option contained in a lease, hereinafter "Lease," between the parties. The Addessis defended on the grounds that they had already exercised an option to terminate the Lease on November 12, 1964, that the parties by a specific provision in the (recorded) Lease, had made the Lease "subject to" an unrecorded side agreement, hereinafter "Agreement," which contained the Addessis' option to terminate, and that it was in fact the intent of the parties that the Addessis were to have an unfettered right to terminate and Shell was not entitled to specific performance.

At the inception of the contractual relationship on April 7, 1954, the Addessis executed an essentially printed form lease with Shell of certain real property in Cranston, Rhode Island.

At the same time the parties executed the Lease, they executed the Agreement dated April 7, 1954.

The Agreement provided in its essential part:

> "First Party may, at their option, terminate said lease at any time during the term thereof by giving Shell Oil Company at least one hundred eighty days notice and paying as consideration therefor an amount equivalent to eight thousand nine hundred and fifty ($8,950.00), depreciated at the rate of six and two-thirds (6⅔) per cent per year from the date of said lease, and by paying and discharging all balances due the then holder of that certain mortgage to Citizens Savings Bank of Providence, Rhode Island."

Article 2(a) of the Lease was typewritten and provided:

> "This lease shall be subject to that certain agreement between the parties hereto, dated simultaneously

herewith, said agreement being hereby incorporated by reference herein."

Article 9 of the Lease was typed in a different style of type and provided:

> "At any time during the original term of this lease or any extension thereof or any tenancy thereafter, Shell shall have the option to purchase the premises for the sum of forty thousand dollars ($40,000) less five hundred dollars ($500.00) per year for every year of the original term of this lease or any extension thereof, on the terms provided in Article 11, which option Shell may exercise by notice to Lessor."

The parties also executed simultaneously on April 7, 1954, a printed form lease from Shell to the Addessis (hereinafter "Lease-back"). Article 10 of the Lease-Back provided that it was "subject to all the covenants and conditions of the lease under which Shell is now entitled to possession . . ."

On November 12, 1964, the Addessis mailed to Shell a notice of exercise of their option to terminate the Lease. This notice provided that the Addessis:

> ". . . *do hereby give Shell Oil Company notice that we will terminate the lease on May 17, 1965,* said time between November 12, 1964, and May 17, 1965, being more than the 180 days notice required in accordance with that certain agreement dated April 7, 1954, referred to and incorporated into the lease in paragraph 22(a) of said lease, and we further notify Shell Oil Company that we will discharge all balances due the holder of that certain mortgage to Citizens Savings Bank on said premises prior to the date of termination

and provide Shell Oil Company with satisfactory evidence thereof, and that we will pay the sum due Shell Oil Company as computed in accordance with the terms of that certain agreement referred to and incorporated into the said lease."

On January 19, 1965, Shell mailed to the Addessis a notice that it elected to exercise its option to purchase. The notice provides in part:

"Please take notice that we hereby elect to exercise our option to purchase these premises *subject to* and in accordance with the provisions of said lease and this letter is the notice required pursuant of the provisions of Article 9 thereof." (Emphasis supplied)

Both parties agreed that each other was ready, willing and able to perform their respective obligations and the question presented was who was entitled to the premises. The District Court heard the matter first on Shell's motion for summary judgment which was denied. In denying Shell's motion the Court said:

"I am not prepared to give any other meaning to the words, "subject to," than that the option to purchase was "subservient to," was "limited by" the right of the lessors to terminate said lease. I think any other interpretation of the words, "subject to," would in the instant case be clearly contrary to the intention of the parties.

I am far from satisfied that the plaintiff is entitled to summary judgment in its favor."

The Addessis subsequently filed a motion for summary judgment and in granting the Addessis' motion the Court

repeated the aforesaid language verbatim and further stated:

> "If, as the plaintiff now argues, it was the intention of the parties that the defendants would have an option to terminate only in the event that the Lease-Back, so-called, from the plaintiff to the defendants were cancelled by Shell Oil Company, it would have been a simple matter to so provide in the agreement to which the Lease was subject."

Shell appealed to the Circuit Court which reversed and remanded with directions to enter summary judgment for Shell. In its opinion the Appellate Court said, in part:

> "We, of course, agree with the District Court that the words "subject to" mean that the lease was subordinate to, to the extent of being controlled by, the contemporaneous agreement."

Reasons For Granting the Writ

I. The mandate of the Court of Appeals which reversed summary judgment for the Addessis and ordered summary judgment for Shell was an arbitrary and dangerous abuse of the authority of an appellate court acting under the motion for summary judgment rule. There is no authority for such action by the Court of Appeals. This case presents an important question of federal law and practice which has not been, but should be, settled by this Court.

The basic thrust of this petition is that the Court of Appeals was dangerously wrong because it ignored the existence of a genuine issue of material fact, namely, the intent of the parties as to the purpose, meaning and weight

to be given to the Agreement, containing the Addessis' option to terminate the recorded Lease, and particularly the purpose, meaning and weight to be given the words "shall be subject to" which appear in the Lease and connect it with the unrecorded Agreement.

In support of their own motion each party relied on a legal theory of the case alone, but in defending against their opponent's motion each party claimed the existence of a factual issue and introduced extrinsic evidence in the form of affidavits to support this defense.

Both parties could properly do this.

> "It does not follow that, merely because each side moves for summary judgment, there is no issue of material fact. For, although a defendant may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show that if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists." *Walling* v. *Richmond Screw Anchor Co.*, (CCA 2d., 1946) 154 F2d 780, 784, cert. den. (1946) 328 US 870. See also *Garrett Biblical Institute* v. *American University*, (App. DC 1947) 163 F2d 265. *Colby* v. *Klune*, (CCA 2d 1949) 178 F2d 872.
>
> "The fact that both parties make motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the Court to rule that no fact issue exists. Each, in support of his own motion, may be willing to concede certain contentions of his opponent, which concession, however, is only for the purpose of the pending motion. If the motion is over-ruled, the concession is no longer effective. Appellants' concession that no genuine issue of fact existed was made in support of its own motion for summary judgment. We

> do not think that the concession continues over into the court's separate consideration of appellees' motion for summary judgment in his behalf after appellants' motion was over-ruled." *Begnaud* v. *White* (CCA 6th, 1948) 170 F2d 323, 327.

The filing of motions for summary judgment does not concede the absence of a triable issue of fact and where there is actually a genuine issue of material fact, the court is bound to deny both motions.

> "Since the remedy is extreme and not to be used as a substitute for trial, any doubt as to the existence of a triable issue of material fact must be resolved against the party moving for summary judgment . . ." *Jacobson* v. *Maryland Cas. Co.,* (CCA 8th 1964, 336 F2d 72, cert. den. 379 US 964.)

Shell, following the introduction into the record by agreement of certain documents, moved for summary judgment, primarily on the ground that the Lease was not legally terminated and could not be terminated for 180 days after the Addessis exercised their option to terminate, therefore, the option to purchase contained in the Lease proper (Art. 9) remained open and available for Shell to exercise. The Addessis presented their legal theory of defense against this motion based on two points, as follows:

(1) The parties had specifically provided that the Lease "shall be subject to" the side Agreement and anything in the Lease must yield to the superior *right* to terminate contained in the Agreement. The words "subject to" used in their ordinary sense mean "subordinate to," "subservient to," "limited by." *Engelstein* v. *Mintz,* 345 Ill 48, 61; 177 NE 746, 752 (1931). *Shell Oil Co. Inc.* v. *Manley Oil Corporation, et al.,* 124 F.2d 715 (CCA 7th 1941).

Blacks Law Dictionary, 4th Edition, page 1594. *Pure Oil Co.* v. *Petrolite Corporation, Limited,* 158 F2d 503, 505 (CCA 5th 1946)

(2) The termination of the Lease was effective on the date the notice was mailed. *Estfan* v. *Hawks,* 166 Kan. 712, 204 Pac. 2d 780, 10 ALR 2d 877. *Thompson* v. *Coe,* Conn. 644, 115 A. 219, 17 ALR 1233. *Mason* v. *Curro,* Munic. Ct. of App., D.C. 41A2d 164 (1945). 32 AMERICAN JURISPRUDENCE, page 838, Sec. 996. 32 AMERICAN JURISPRUDENCE, LANDLORD AND TENANT, page 287 Section 309.

Of prime importance in the consideration of this petition, the Addessis also presented an alternate defense to Shell's motion, namely, that if the District Court did not adopt the Addessis' legal theory of the case, then the Addessis should have the right to introduce extrinisic evidence because (1) the right to purchase asserted by Shell was inconsistent with the right of termination granted to the Addessis in the side Agreement and which was exercised by them prior to Shell's exercise of its right to purchase and (2) the phrase "shall be subject to" in Article 2a of the Lease was ambiguous as to the true nature, purpose and intent to be accorded the Agreement. In support of this alternate defense the Addessis presented the affidavit of Albert Addessi to explain the meaning, intent and purpose of the parties in executing the Agreement and in making the termination right superior to any inconsistent provision of the Lease.

But the District Court did not reach the factual defense. In denying Shell's motion, the Court adopted the Addessis' legal theory of the case and did not consider, nor did it need to consider, the alternate defense and the affidavit of Albert Addessi.

The Addessis subsequently moved for summary judgment on the basis of their legal theory alone and Shell, in defense, introduced the affidavit of one of its employees who wit-

nessed the signing by the Addessis of the contractual documents in 1954, to show that the intent, meaning and purpose of the Agreement was only to permit the Addessis to cancel the Lease if Shell cancelled the Lease-Back between the parties. The District Court granted the Addessis motion for summary judgment based upon the same theory of law advanced by the Addessis in defense to Shell's motion.

Shell appealed and in reversing summary judgment for the Addessis and ordering summary judgment for Shell, the Circuit Court either overlooked the affidavits and the alternate defense or arbitrarily dismissed them without comment or discussion and gave a mandate of final judgment for Shell. This has resulted in a violation of the summary judgment rule. To prevent a grave miscarriage of justice and eliminate a dangerous precedent, the mandate of the Circuit Court should be reviewed and reversed.

The Circuit Court did not consider the affidavits of the parties and disposed of the case by attributing to the Agreement the meaning and effect of "accelerating" the use of the purchase option by Shell. Neither party had so contended. This construction, so inconsistent with the terms and intent of the contract between the patries, ignores the whole thrust of the Addessis' contention that the sole purpose of the Agreement was to give them the *right* to terminate the Lease in an orderly manner, which right was theirs in all events and anything in the Lease inconsistent therewith must yield to this right. Parts of the Lease not inconsistent with the *right* to terminate were to continue for 180 days to ensure an orderly termination. This was the intent and purpose of the Agreement and minus such an intent and purpose the Agreement was a futile gesture. The factual issue raised by the Addessis was directed to this point and this alone. The question arises why would the parties go to a great deal of negotiation and trouble to confer an innocuous and meaningless

exercise on the part of the Addessis, namely, "acceleration" of the purchase option with the consequent deprivation to them of the advantages to be attained by their exercising the option to terminate the Lease, and in turn giving to Shell the advantages it would attain by termination of the Lease by way of a contract ofsale through the exercise of its purchase option. If this were the intent of the parties, why did they not simply say so in the Lease proper in similar fashion to what the parties did in *Humble Oil & Refining Co.* v. *Lennon*, 94 R.I. 509, 182A 2d 306 (1962), which is the only prior Rhode Island case remotely in point on its facts. That case involved a right reserved to the Lessor to terminate an option to purchase given to the Lessee and it was specifically provided therein that the right to purchase would not terminate until the expiration of six months after the receipt of notice to terminate. The words "subject to" used extensively in statutes, rules of court, deeds, insurance policies, savings bank books, bus, train and plane tickets and many other types of contractual and commercial documents appear to have meaning enough to protect the government, the Court, the mortgagee, the insurance company, the bank, the carrier and others but these very same words are considered meaningless when they are intended to protect the Addessis in the free and uninterrupted exercise of their contractual rights.

Strangely the Circuit Court stated that it agreed with the District Court that the words "subject to" meant "subordinate to" but in reaching its decision it appears to have reversed the effect of these words and made the Addessis' option to terminate the Lease "subject to" being thwarted and interrupted by the option to purchase. The decision downgraded the Addessis' right, a superior right of termination, into something entirely different, namely, a mere right of "acceleration" of the option to

purchase held by Shell, and the effect of this was a staggering loss to the Addessis.

The Court of Appeals has removed one case from a congested court calendar but the intent of the parties in making this side Agreement has not been determined by converting the only real protection the Addessis had in this otherwise one-sided contract into a meaningless right. This failure of the Court to pay heed to the factual questions raised by the parties and in arriving at a result, "acceleration," which neither party asserted and which belies the affidavits in the record, is apparent on careful review of the record. Then, after twisting the intent and purpose of the Agreement, the Court shuts off a determination of the factual issues raised by mandating judgment for the original Plaintiff, Shell.

If it be assumed that the assertions of the parties are in good faith, then a dispute as to a material fact exists which precludes summary judgment. *U.S.* v. *Kansas Gas & Electric Co.*, 287 F2d 601 (CCA 10th 1961.)

This Court last decided a case involving the power of an appellate court to remand and order summary judgment for the appellant in the case of *Fountain* v. *Filson* (1949) 336 US 68), and this Court therein reversed the action of the Court of Appeals.

Such action by the Court of Appeals in this case, where the sworn affidavits of the parties as to their intent have been totally disregarded by the Court of Appeals, is a dangerous precedent.

The Addessis in attempting to shorten this long ordeal have had the courthouse door slammed in their faces by an arbitrary action of the Court of Appeals, which did not seem concerned with the actual expressed intent of the parties.

If an appellate court has the power to order summary judgment for an appellant, it should cautiously use such

power so that an appellee is not deprived of a trial of a genuine issue of material fact underlying its defense. MOORES FEDERAL PRACTICE, Volume 6, page 2977.

II. The parol evidence rule does not apply.

In the event a question as to the parol evidence rule should arise, the Addessis contend it has no application. The rule is a tool to be used by a working trial court and not a device to be used arbitrarily by an appellate court to choke off the search for the truth in a summary judgment proceeding in that appellate court. The rule was discussed at length in the case of *Golden Gate Corporation* v. *Barrington College,* R.I. 199 A 2d 586, 589 (1966).

> "Without attempting a complete enumeration or examination of our decisions in which the rule has been held inapplicable, reference to some instances where parol evidence has been admitted even where that evidence added to, varied, altered or contradicted the terms of a later unambiguous writing, amply demonstrates that the rule is neither all-inclusive nor self-executing." (The Court cites numerous cases where the rule was held inapplicable.)
>
> * * *
>
> "These examples of inapplicability clearly demonstrate that the issue of the admissibility of parol is not susceptible to the simple test of the presence or absence of fraud or mistake or ambiguity."

It is practically impossible for an appellate court to determine the applicability of the rule where there has been no test in the trial court based upon an examination into the surrounding facts and circumstances. In the cited case, *Golden Gate Corporation* v. *Barrington College*, supra, the court, in discussing whether the executed lease was

adopted by the parties as a final and complete expression of their agreement, points out that the trial court should allow inquiry into surrounding circumstances before it can be determined whether the agreement contains the entire contract, including the intent of the parties. It was held that, deprived of such a foundation, the trial justice could not properly pass on the applicability of the rule. The failure to state clearly and completely within the terms of the Lease and the Agreement the fact that the parties intended the right of the Addessis to terminate be superior to any inconsistent provision of the Lease and that such a right was to be available, and unconditionally effective, requires extrinsic evidence.

III. The issue of fact raised by the parties is not frivilous or inconsequential, but it is genuine, and substantial requiring determination by a trial court.

This point need not be labored. The circumstances surrounding the preparation of the Agreement, following preparation of the printed Lease by Shell, the failure of Shell to record the Agreement, and the whole purpose and intent in executing a supplementary agreement require exploration. Otherwise the summary judgment rule becomes an arbitrary judgment rule with the Circuit Court in the role of ignoring without comment an unresolved factual issue raised by *both* parties and imposing judgment on the basis of the resolution of only one of two issues of record.

IV. Can a Circuit Court of Appeals, within the letter and spirit of the summary judgment rule, reverse the decision of a trial court and mandate judgment for one party without absolute conviction that no genuine issue of material fact exists, a conviction based upon the entire record and either an express admission by *both* parties

that there is no such issue or an assurance the issue raised is frivilous or purely dilatory.

Again this point needs little elaboration. It would seem that this Court, the source and promulgator of the Rules of Civil Procedure, in order to restrain future abuse or misconception of the rule, should direct that in a case where the trial court is reversed, it should be remanded to the trial court with an opinion pertaining to questions of law raised by the motions and with either a show cause order to be heard below or a mandate for further proceedings. Unless extreme caution is exercised by the Appellate Court final justice may be perverted. The Appellate Court, not geared to a resolution of factual issues and inhibiting the raising of new issues on appeal, should not foreclose to litigants an opportunity to be heard further in a trial court on any possible relevant and material issue which may remain or which may be born as a result of the opinion of the appellate court.

As to the power of a court of appeals to mandate judgment against the party reversed on appeal, Moore raises the serious question: "On reversal of a summary judgment, may the appeal court order summary judgment for the appellant?" MOORE ON FEDERAL PRACTICE, Volume 6, page 2977. Apparently Moore appears to recognize this may be done but only with a cautious exercise of judicial power. In this regard he states: "In other words we believe an appellate court has the power to order summary judgment for appellant, both where he made no motion and also where he made a cross-motion in the trial court, although the power must be cautiously used to the end that the appellee is not deprived of a trial of a genuine issue of material fact underlying his claim or defense." There is no shortcut to the truth.

In the case at bar the attention of the Circuit Court was called, both in the briefs and arguments of Shell and the Addessis, to a factual issue raised by the parties and, the Addessis, in their petition for reargument, again called attention to this issue. The Circuit Court was and is completely silent on this factual issue described and argued hereinabove. The petitioners can find no cases or authorities wherein a mandate of judgment was entered by a circuit court for one party, the trial court having ruled for the other party on cross-motions under the summary judgment rule.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

ADOLPH N. ANDERSON, JR.
170 Westminster Street
Providence, Rhode Island 02903
Counsel for the Petitioners

CHARLES H. DRUMMEY
85 Westminster Street
Providence, Rhode Island 02903
Of Counsel

September 1966

Appendix A

United States Court of Appeals
For the First Circuit

No. 6708.

SHELL OIL COMPANY,
PLAINTIFF, APPELLANT,

v.

ALBERT ADDESSI ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before ALDRICH, *Chief Judge,*
MCENTEE and COFFIN, *Circuit Judges.*

George M. Vetter, Jr., with whom *Matthew W. Goring* and *Hinckley, Allen, Salisbury & Parsons* were on brief, for appellant.
Adolph N. Anderson, Jr., with whom *Charles H. Drummey* was on brief, for appellees.

OPINION OF THE COURT.
June 27, 1966.

ALDRICH, *Chief Judge.* This is a diversity action brought in the district court for the District of Rhode Island for specific enforcement of a Rhode Island contract. Plaintiff, Shell Oil Company, is a Delaware corporation. The defendants, hereinafter the Addessis, husband and wife, are citizens of Rhode Island. In 1954 the parties entered into a fifteen-year lease, on Shell's standard printed form, of a gasoline filling station in Cranston, Rhode Island, Shell being the lessee. However, by a typewritten provision it

was stated, "This lease shall be *subject to* that certain agreement between the parties hereto, dated simultaneously herewith, said agreement being hereby incorporated by reference herein." (Ital. suppl.) This agreement provided that "[The Addessis] may, at their option, terminate said lease at any time during the term thereof by giving Shell at least one hundred eighty days notice and paying as consideration therefor . . . ." The lease, also by typewritten insertion, contained the following provision:

"9. At any time during the original term of this lease or any extension thereof or any tenancy thereafter, Shell shall have the option to purchase the premises for the sum of . . . ."

On November 12, 1964 the Addessis addressed a notice to Shell, stating, *inter alia*, that they "*do hereby give Shell Oil Company notice that we will terminate the lease on May 17, 1965*, said time between November 12, 1964, and May 17, 1965, being more than the 180 days notice required . . . ." (Ital. in orig.) On January 19, 1965 Shell duly purported to exercise the option to purchase. The Addessis refused, and this action followed.

Upon the foregoing facts (and certain others which reduced the issues between the parties) sufficiently appearing, Shell sought a summary judgment of specific performance, and the Addessis sought a summary judgment of dismissal. The sole question presented by both motions was whether, by a proper construction of the documents, Shell's option to purchase was in existence after receipt of the notice of November 12, 1964. The district court, stating that "a notice to terminate effectively terminates the lease when served, not when the lessee must vacate the premises," granted the Addessis' motion. This appeal followed.

We do not agree with the district court. The italicized words in the notice of November 12, *supra*, stated the legal

situation exactly. One hundred eighty days' notice must mean advance notice. The lease did not terminate until May 17, 1965, the date specified in the notice. "If a period of notice is required, the contract remains in force and must continue to be performed according to its terms during the specified period after receipt of the notice of termination." 6 Corbin, Contracts, §1266 (1962). *Cf. Remmick Corp.* v. *Wallace,* 1938, 61 R.I. 282, 200 Atl. 765, where the court observed that a notice to quit terminated the tenancy on the date specified to quit. We cannot accept the suggestion that between November 12, 1964 and May 17, 1965, Shell was not a tenant, and that during this period it did not have all of the rights as well as obligations that were provided in the lease. During argument we asked in what ways Shell's relationship as lessee was changed, but the question received no real answer.*

Furthermore, the option, by its terms, was exercisable not only during the period of the lease, but also "during . . . any tenancy thereafter." Therefore, if we look at the option alone, it was exercisable during the period between November 12 and May 17 even if the lease should be regarded as ended on November 12. In such event, Shell would at least have continued in lawful occupancy as a tenant of some sort until May 17, making this interval a "tenancy thereafter."

The Addessis contend that even if their notice did not terminate the lease forthwith it nevertheless terminated the option because of the provision that the "lease shall

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*The Addessis did cite the case of *Estfan* v. *Hawkes*, 1949, 169 Kan. 172, 204 P.2d 780, where the court stated in a somewhat similar situation that the lease terminated upon receipt of notice. The court supplied neither authority nor reasoning. We think the reasoning is all the other way. The Addessis would have been the first to say so, had Shell not paid the rent. *Estfan* is in any event distinguishable because of the presence of a clause in the instant option that we are about to refer to.

be subject to" the contemporaneous agreement. We, of course, agree with the district court that the words "subject to" mean that the lease was subordinate to, to the extent of being controlled by, the contemporaneous agreement. The agreement, however, does not specifically refer to the option, and nothing in it indicates that the option, unlike all the other rights and obligations in the lease, was intended to be cut off without notice. The Addessis argue that the power to cut off the option as of the date of notice must, nevertheless, be inferred from the agreement, because otherwise the right to terminate contained therein would be a "nullity." We cannot agree either that the stated right to terminate the lease was in reality an absolute right to recover possession, or that the agreement, if not so interpreted, was meaningless. As construed by Shell the termination clause permits shortening the period of the lease, and of the option, precisely to the same extent, *i.e.*, from a period of perhaps years to a period of 180 days. This is not meaningless with respect to either obligation. Rather, it authorizes a substantial acceleration of the date on which Shell must either pay the agreed price for the property, or give it up. It is true that because of the option the termination of the lease will not necessarily revest the property itself in the Addessis, but this is the risk that was inherent once the option was initially granted.

Rather than Shell's construction making the termination clause a nullity, the Addessis' construction would make the option itself all but a nullity, since by the mere giving of the notice it could be unilaterally terminated. In oral argument counsel for the Addessis appropriately stated their position. "We do not concede that a valid option existed here, because it could always have been cut off." This would be an extreme result. We are unwilling to say that a clause which provides, simply, that the lease may be

terminated on 180 days notice, means that the option, not even referred to, was terminable instanter.

No Rhode Island case indicates a contrary result. In such circumstances we assume that the Rhode Island court would give to language what we regard to be its proper meaning.

Judgment will be entered vacating the judgments of the District Court and remanding the action with directions to enter summary judgment for the plaintiff.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6708.

SHELL OIL COMPANY,
Plaintiff, Appellant,
v.
ALBERT ADDESSI ET AL.,
Defendants, Appellees.

JUDGMENT
June 27, 1966.

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgments of the District Court are vacated, and the action is remanded to that Court with directions to enter summary judgment for the plaintiff.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

[cc: Messrs. Vetter and Anderson.]

Appendix C

STENOGRAPHIC TRANSCRIPT OF DECISION OF THE COURT in re PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

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[1] Before his Honor, Judge Day
Monday, December 20, 1965

[2] The Court: (Delivered orally from the bench) This is an action for specific performance of an option to purchase certain real estate, such option having been provided for in a certain indenture of lease between the plaintiff and the defendants. This lease was executed on April 7, 1954. Its term extended from November 1, 1954 to October 31, 1969. It appears that contemporaneously with the execution of the lease the parties executed a separate agreement reserving to the lessors the right to terminate the lease on the giving of a minimum of one hundred and eighty (180) days' notice and the making of certain payments specified therein.

The lease itself, which is a printed form of lease, had typewritten therein as a modification before its execution a paragraph numbered 2(a). This paragraph reads as follows:

> "2(a). This lease shall be subject to that certain agreement between the parties hereto, dated simultaneously herewith, said agreement being hereby incorporated by reference herein."

It appears that the plaintiff took possession of the demised premises and that on November 12, 1964 the defendants notified the plaintiff in writing of their [3] election to exercise their option to terminate the lease and that said termination would take effect on May 17, 1965. Subsequently on January 19, 1965 the plaintiff mailed to the defendants a notice that it elected to exercise its option

to purchase the leased premises, as provided in its lease. As one of the conditions imposed upon the defendants for the exercise of their option to terminate the lease, they were required to pay the plaintiff an amount equivalent to $8,950.00 depreciated at the rate of 6-2/3 per cent per year from the date of said lease, and to pay and discharge all balances due the holders of a certain real estate mortgage on the demised premises.

It appears that on May 17, 1965 the defendants did tender any and all sums then owing by them to plaintiff and that the mortgage referred to in the agreement was previously discharged on May 10, 1965.

The matter is presently before me on the plaintiff's motion for a summary judgment in its favor, granting it the relief sought, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

It is clear that summary judgment may only be entered if there is no genuine issue as to any material fact, and, further, that the movant is clearly entitled [4] to judgment as a matter of law. The burden of establishing the nonexistence of any genuine issue of material fact and that he is entitled to judgment as a matter of law rests upon the movant.

I feel that this is a most unusual situation. Here the parties specifically provided that said lease should be subject to said agreement between the lessors and the lessee, dated simultaneously therewith.

The case of *Humble Oil & Refining Co.* v. *Lennon*, 94 R.I. 509, cited by the plaintiff, is in my opinion clearly distinguishable from the instant case. In that case the lease provided in pertinent part:

> " * * * Lessor may terminate the right and option of the Lessee to purchase said property at any time on giving six months' notice of his intention so to do and the right and option of Lessee to purchase

shall terminate on the expiration of six months after the receipt of such notice. * * * "

Clearly, in Humble Oil, supra, the option to purchase would not terminate until the expiration of six months after the receipt of the notice of the lessor's exercise of his right to terminate. No such saving [5] provision was contained in the lease in this case. Said lease and its option to purchase were subject to said agreement of even date therewith giving the lessors the right to terminate said lease upon at least one hundred and eighty (180) days' notice in writing, which was given in this case.

I am not prepared to give any other meaning to the words, "subject to," than that the option to purchase was "subservient to," was "limited by" the right of the lessors to terminate said lease. I think any other interpretation of the words, "subject to," would in the instant case be clearly contrary to the intention of the parties.

I am far from satisfied that the plaintiff is entitled to summary judgment in its favor. The plaintiff's motion for summary judgment is denied; its objection to the Court's ruling is noted.

Appendix D

STENOGRAPHIC TRANSCRIPT OF DECISION OF THE COURT IN RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

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[1] Before his Honor, Judge Day
Monday, March 7, 1966

[2] The Court: (Delivered orally from the bench) This is an action for specific performance of an option to purchase certain real estate, such option having been provided for in a lease between the plaintiff and the defendants. This lease was executed on April 7, 1954 and was for a term extending from November 1, 1954 to October 31, 1969.

Contemporaneously with the execution of the lease the parties executed a separate instrument, preserving to the lessors the right to terminate said lease upon the giving of a minimum of 180 days' notice to the lessee and the making by them of certain payments specified in said agreement.

Article 2(a) of the lease in question reads as follows:

> "This lease shall be subject to that certain agreement between the parties hereto, dated simultaneously herewith, said agreement being hereby incorporated by reference herein."

Said agreement provided in pertinent part as follows:

> ". . . in consideration of One Dollar ($1.00) and other good and valuable consideration paid to Shell, [3] receipt whereof is hereby acknowledged, Shell and First Party (the defendants in this action) hereby agree as follows:
>
> "First Party may, at their option, terminate said lease at any time during the term thereof by giving Shell at least one hundred eighty days notice and paying as consideration therefor an amount equivalent to eight thousand nine hundred and fifty ($8,950.00),

depreciated at the rate of six and two-thirds (6-2/3) percent per year from the date of said lease, and by paying and discharging all balances due the then holder of that certain mortgage to Citizens Savings Bank of Providence, Rhode Island."

From a stipulation of the parties filed in support of a previous motion for summary judgment by the plaintiff, it appears that the plaintiff took possession of the demised premises. It further appears by said stipulation that on November 12, 1964 the defendants mailed to plaintiff, Shell Oil Company, a notice in writing of their election [4] to exercise their option to terminate provided in the agreement to which I have referred, and that such termination would take effect on May 17, 1965. On January 17, 1965 Shell mailed to the defendants notice that it elected to purchase the leased premises pursuant to the option provided in Article 9 of said lease.

As one of the condtions imposed upon the defendants—the party of the first part—for the exercise of their option to terminate said lease, they were required to pay the plaintiff an amount equivalent to $8,950.00 depreciated at the rate of 6-2/3 percent per year from the date of the lease, and to pay and discharge the balances due the holder or holders of a certain real estate mortgage on the leased premises.

The parties have stipulated that said mortgage was discharged by the defendants on May 10, 1965, and that on May 17, 1965 the defendants tendered any and all sums then owing by them to the plaintiff. It isn't clear from the record whether or not said sums were accepted by the plaintiff, but for purposes of this motion the Court will assume they were not.

The matter is before me this time on the motion of the defendants for summary judgment in their favor.

[5] As I indicated, in passing upon the motion of the plaintiff, Shell Oil Company, some time ago,—that being a similar motion—the Court should not grant a motion for summary judgment if there is any genuine issue as to a material fact; and the burden of establishing the non-existence of a genuine issue as to a material fact is upon the party moving for summary judgment.

Where the termination of a lease is relied upon to establish the termination of an option to purchase contained in that lease, it is, of course, necessary for the lessor or lessors to show that an effective legal termination of the lease had been accomplished.

The question on the instant motion, as with respect to the earlier motion filed by Shell Oil Company, is whether the notice given by the defendants effectively terminated the lease of the defendants when it was given, to wit, on November 12, 1964. In denying the motion of Shell Oil Company for summary judgment, and referring to the words, "subject to," as used in Article 2(a) in the lease, I had this to say:

> "I am not prepared to give any other meaning to the words, "subject to,' than that the option to purchase was 'subservient to,' was 'limited by' [6] the right of the lessors to terminate said lease. I think any other interpretation of the words, 'subject to,' would in the instant case be clearly contrary to the intention of the parties."

If, as the plaintiff now argues, it was the intention of the parties that the defendants would have an option to terminate only in the event that the lease-back, so-called, from the plaintiff to the defendants were cancelled by Shell Oil Company, it would have been a simple matter to so provide in the agreement to which the lease was subject.

In my opinion the lease and the option to purchase contained therein were subject to the right reserved by

the lessors to terminate said lease upon giving at least 180 days' written notice. The option contained in the lease in this respect is clearly, in my opinion, distinguishable from the provision made for the option in the case of *Humble Oil & Refining Co.* v. *Lennon,* 94 R.I. 509, which had been previously cited by the plaintiff. Here the lease and the option to purchase contained therein were subject to the right reserved by the lessors to terminate said lease upon giving at least 180 days' written notice.

In my opinion it is the better view that a notice [7] to terminate effectively terminates the lease when served, not when the lessee must vacate the premises. *Estfan* v. *Hawks,* (1949), 169 Kan. 712, 204 P. 2d 780.

It is clear here that the notice to terminate became effective as of the date of its giving, to wit, November 12, 1964, which date was prior to the election by the lessee, Shell, to exercise its option to purchase. Accordingly, I am constrained to grant the defendants' motion for summary judgment in their favor. The plaintiff's objection to the Court's ruling is noted.